JUDICIAL REVIEW OF ADMINISTRATIVE ACTION BY THE PREROGATIVE ORDERS

The complexity of modern life is marked by an increasing demand for greater socialization. This has rendered it necessary to vest more and more discretionary power in persons or bodies charged with the administration. Alongside it, has developed a fear that in the process, the rights of the individual might sink below water. This in turn provokes doubts as to the efficacy of the existing machinery of judicial control of administrative action. The general climate of opinion, both judicial and juristic (at least that voiced) favours the continental as opposed to the common law system of judicial control over the executive[1] — loud in praises of one and castigating in no uncertain terms the inadequacy of the other. Bearing the brunt of the attack are the prerogative orders[2] of mandamus, prohibition and certiorari which have been condemned as moribund or "archaic, cumbrous and inelastic" and designed or "planned for the evil purpose of thwarting justice and maximising fruitless litigation."[3] From the bench conies this oft-quoted extra-judicial pronouncement : ". . .Just as the pitch and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari and action on the case are not suitable for the winning of freedom in the new age..."[4] Eight years later, the Frank's Committee (1957) took the opposite stand : "It is sometimes asserted that the procedure involved in seeking these remedies is unduly complex, but we think that this criticism is unfounded."[5]

The whole topic is highly controversial and this paper is an essay on the part of the writer to come to grips with the efficacy of judicial control of the actions of the executive through the prerogative orders. In order to assess the position more accurately, it would be salutary to bear in mind the precise role of the courts in the context of the world

1. In France, the general administrative remedy is by a petition filed with the appropriate administrative court containing a summary statement of the facts, the grounds on which relief is sought and the nature of the relief. In Germany, the *Generalklausal* gives anyone whose rights are injured by public power a right to legal redress. *Cf.* U.S. Federal Administrative Procedure Act, 1946, s.10, which appears to give a general right of review of administrative action comparable to the *Generalklausal*. However the limitations on the section render its scope uncertain.

2. Previously, the prerogative writs. Change brought about in England by the Administration of Justice (Miscellaneous Provisions) Acts, 1933, s.5, and 1938, s.7.

3. Davis, *Administrative Law,* p. 126.

4. Denning, *Freedom Under the Law,* p. 126 (1949).

5. Cmnd. 218 (1957), para. 117. It also recommended that remedies by certiorari, prohibition and mandamus be not excluded by statute.

of administration. Firstly, it must be recognised that public authorities are set up to govern and administer. They must have freedom to act. Without such freedom any effective administration would be paralysed. On the other hand, this freedom must be kept in check lest it degenerates into arbitrariness. The province of the judge therefore is to confine the administration within the bounds of legality and not to determine for himself the wisdom of the challenged administrative action; judicial review is aimed to check — not to supplant — administrative action. [6] The courts act as "a major instrument of social welfare and social equilibrium."[7] Also, it is necessary to examine the scope of these different orders in order to determine whether the criticisms levelled against them are justified.

First and foremost, it must be noted that there is no one comprehensive proceeding for reviewing administrative acts. The remedies are plural and some cannot be used if another remedy is available. Unfortunately the lines between them are imprecise and shifting. Recourse to the law reports makes confusion more confounded. "Thousands of cases draw lines. The more the cases, the more the lines. The more the lines the more the confusion. Yet the litigant must label his pleading at his peril. . . ."[8] This sentiment is echoed by another writer who likened the problem of whether a prerogative order will lie as bearing a startling resemblance to the old question whether the proper form of action had been followed.[9] This point is forcibly brought home in a number of Malayan cases. In *Badat bin Drani* v. *Tan Kheai*[10] an order of certiorari was sought to quash an order of a rent board in Raub, Pahang. The board ordered the applicant to vacate certain premises, an act outside its jurisdiction since the only orders it could make were to grant leave to sue for possession or to refuse possession. The applicant was therefore fully entitled to certiorari for excess of jurisdiction. However, it was refused on the ground that its issue was discretionary and would not be granted if the conduct of the applicant had been such as to disentitle him to the relief asked for. Where then had the applicant gone wrong? "... the conduct of the applicant which I do not criticise on any moral grounds but merely deal with from a purely legal aspect, has disentitled him." — *per* Briggs J. at p. 67. What really happened then was that the applicant should have availed himself of the normal remedy of appeal in the High Court and his choice of the

6. Note the obstructive attitude of the United States Supreme Court with respect to the New Deal legislation which precipitated bitter remarks by President Roosevelt — one of the factors which caused the Constituent Assembly to substitute the "due process" clause by "procedure established by law" in article 21 of the Indian constitution.
7. De Smith, *Judicial Review of Administrative Action,* p. 3 (1959).
8. Davis, *Administrative Law*, p. 718 (1951).
9. S. E. Edwards, 25 *Canadian Bar Rev*., 1159
10. (1953) 19 M.L.J. 67.

wrong form of action had proved fatal. A similar result is seen in *Melayu Raya Press Ltd.* v. *Colonial Secretary*. [11] An order of certiorari was there sought to quash an order made by the Colonial Secretary withdrawing a licence granted to the applicant company for keeping and using a printing press. It was held that on the true construction of section 3(1) of the Printing Presses Ordinance (Singapore) (Cap. 226) the withdrawal of a licence by the Colonial Secretary was a judicial function and hence certiorari could properly lie. Again the order was refused on the ground that the applicants had failed to avail themselves of an appeal to the Governor-in-Council as provided by section 3(3) of the Ordinance. Similarly[12] in *Choo Yin Loo* v. *Registrar of Societies*,[13] an application for certiorari was made to quash certain proceedings before the Registrar of Societies. It amounted in effect to an attempt to determine issues between the parties and since certiorari was not designed for this purpose it could not lie. Also, the appropriate remedy was to contest the validity of the matter in a competent court. This view was reiterated in *Re an Application by Loke Wan Tho*,[14] where an application for certiorari to remove certain resolutions of the City Council, Singapore, into court and have them quashed was objected to on the ground that certiorari was not the proper remedy. Whyatt C.J. in upholding this objection said at p. 150: "...it [certiorari] is not designed nor can it properly be used to determine issues between the parties...the proceedings bear none of the badges...of the judicial process or anything remotely analogous to it..."

The few cases cited above contribute to the view that it behoves a person desirous of impugning an administrative action by the prerogative orders to move with circumspection. It is proposed to delve a little more into the subject by examining more closely each prerogative order as to their scope and limitations as instruments against executive encroachments on private rights.

Mandamus

The purposes for which mandamus will lie are mainly variations of one and the same theme, namely the enforcement by the court of a public duty imposed on a public functionary either at common law[15] or

11. (1951) 17 M.L.J. 89.
12. See also *Stanley* v. *Bull* (1958) 18 M.L.J. 65.
13. (1957) 23 M.L.J. 228.
14. (1956) 22 M.L.J. 149.
15. The term "common law" here includes charter, custom and even contract. In most of the Federation of Malaya, the position is governed by the Specific Relief (Malay States) Ordinance, 1950, s.44(l), which empowers a court to make an order requiring any specific act to be done or forborne, subject to certain limitations. The court is also provided with jurisdiction to make orders or give directions having the same effect as the orders of certiorari, prohibition, mandamus and quo warranto (Pt. C, s.3 of the second schedule, Courts Ordinance, 1948).

by statute. "It is a general command issued in the King's name from the court of King's Bench and directed to any person, corporation and inferior court...requiring them to do some particular thing therein specified which appertains to their office or duty." — Blackstone, Commentaries, III, 109. This general proposition is subject to certain restrictions in practice.

Firstly, it does not issue against the Crown or Crown servants acting exclusively in that capacity.[16] However, where the duty is imposed on the servant himself[17] then any applicant who can prove a sufficient legal interest in its performance can enforce it by mandamus. Thus in *Straits Steamship Co. Ltd.* v. *Owen*,[18] the Harbour Master whose sanction is a prerequisite to any prosecution under the Merchant Shipping Ordinance, was held to be a Crown servant. Nonetheless, mandamus issued to compel him to exercise his discretion in granting or refusing sanction because, on the proper construction of the scope of the Ordinance, a duty was imposed on him towards the public. Does this then mean that every applicant for mandamus must prove a duty is owed to him? The authorities are not clear as to the *locus standi* of an applicant. No case seems to have been decided on the basis that the applicant must prove a duty is owed to him[19] but several cases have held it sufficient if the applicant has some special interest in the subject matter. Thus in *R.* v. *Manchester Corporation*[20] the court held that the appellants, who sought to enforce a clause in an Act which was accepted in committee on their petition, had a sufficient interest though they were not named in the clause. In *R.* v. *Frost*[21] mandamus was refused because the applicant's interest was only indirect. Again, in *Straits Steamship Co. Ltd.* v. *Owen*[22] the plaintiff preferred a charge against the owner of a motor schooner plying between Burma and Penang ports,

In Singapore, an action for mandamus is provided by Order 53. For the distinction between an action for mandamus and an order of mandamus see De Smith, *Judicial Review of Administrative Action* (1959), pp. 425 *et seq.* The Rules of the Supreme Court make no provision for the other prerogative orders, but they are introduced into Singapore by rule 2, of the Preliminary Rules of the R.S.C. 1934, which allows English procedure to be followed locally in the face of lacunae in our procedure. See *G. H. Slot & Co. Ltd.* v. *Registrar of Trade Marks* (1939) 8 M.L.J. 276.

16. *Cf.* s.44(l)(g), Specific Relief (Malay States) Ordinance, 1950, which prohibits the High Court "to make any order on any servant of the Government as such, merely to enforce the satisfaction of a claim upon the Government."
17. *R.* v. *Commissioners for Special Purposes of Income Tax* (1888) L.R. 21 Q.B. 313.
18. (1932) 1 M.L.J. 167.
19. *Obiter dicta* in *R.* v. *Lewisham Union* [1897] 1 Q.B. 498, and an unreported dictum of Channel J., cited with approval *(obiter)* by Avory J. in *R.* v. *Manchester Corporation* [1911] 1 K.B. 560, indicate that the applicant must prove that a duty is owed to him.
20. [1911] 1 K.B. 560.
21. (1838) 8 A. & E. 822.
22. (1932) 1 M.L.J. 167.

for being defectively manned in contravention of section 14 of the Merchant Shipping Ordinance.[23] The question arose as to whether the plaintiff had any *locus standi*. The plaintiff company was a rival shipping concern; their officers were all properly certificated; as such, non-observance of the rule laid down for the safety of ships in navigation by the defendant constituted unfair competition. It was therefore held that the plaintiff had sufficient interest in the subject matter of the proposed prosecution. A few years earlier, in *Mundell* v. *Melor*,[24] on a motion for mandamus, the *locus standi* of the applicant was impeached. A tribunal set up to investigate certain facts relating to a fatal accident in a soap factory, and to report its findings to a local authority, refused to grant a right of audience to the applicant, an advocate and solicitor, who appeared on behalf of a witness called before the tribunal. Deane J. held that since the report of the tribunal may induce the local authority to prohibit the witness from exercising his calling or subject him to criminal prosecution, the rights of the witness are so closely affected as to vest in him a right to be heard and hence a right to be represented by counsel. This case is of special interest in view of *Chia Khin Sze* v. *Mentri Besar*, *State of Selangor*,[25] which bears the distinction of being the first case where an attempt was made to assert a fundamental right under the Federation of Malaya constitution, *viz.* the right to counsel guaranteed under article 5 (3). A detainee under the (Selangor) Restricted Residence Enactment applied to be allowed representation by counsel and the right to call witnesses at an enquiry to be held under the Enactment. It was agreed by both parties that mandamus could properly lie by virtue of section 44 of the Specific Relief (Malay States) Ordinance, 1950, provided that the detainee could establish a right to be represented by counsel under the constitution with respect to such an enquiry. Section 44(1) (*a*) of the Ordinance subjects the grant of an order to proof that if the order was not granted, the "personal right" of the applicant would be injured. The applicant failed to prove he had a right to be represented by counsel in such enquiries and this was fatal to the application for mandamus.[26] Finally, in *Ckandrasegaram* v. *Prime Minister of the Federation of Malaya*[27] an application for mandamus was made to recompute the pension granted to the applicant to include the period of no-pay leave as pensionable. Mandamus was refused on the ground, *inter alia*, that there was no *right* to a pension. From a survey of the above cases, it would appear that there is no criterion as to what constitutes a sufficient legal interest. It is a question of fact, and whether the efficacy of mandamus as an instrument of

23. S.14 of the Merchant Shipping Ordinance requires every foreign going ship to be manned by officers properly certificated.

24. [1929] S.S.L.R. 152.

25. (1958) 24 M.L.J. 105.

26. For criticism of this case, see (1958) 24 M.L.J. xli-xlii.

27. (1957) 24 M.L.J. 278.

reviewing administrative action is enhanced by this in the ultimate analysis depends on the judiciary, which in considering whether the interest of the applicant in the performance of the public duty is one which merits judicial support, has to strike a balance between the general interest in the preservation of public rights and liberties, and the need to prevent unnecessary litigious interference with the administration.

The second limitation to which mandamus is subject is that it lies to enforce a duty[28] (a demand for its performance must first be made) ; the duty must be an imperative and not a discretionary one. Whether a duty is imperative or discretionary is essentially a matter of interpretation, and in practice, if the courts wish to interfere, they tend to give the statute a mandatory effect. Thus, it would appear that mandamus is of limited importance as a method of reviewing administrative action since the executive rarely refuses to act at all. However, it is submitted, glosses on the supposed principle that it does not lie for discretionary acts have rendered it not entirely impotent as an instrument of judicial review. The courts do possess a certain amount of control over the exercise of a discretion,[29] proceeding on the principle that an abuse of discretion *(e.g.* taking into account extraneous considerations or motivated by improper purposes) constitutes non-user and hence the offending body is amenable to mandamus. This fiction has widened the scope of mandamus to a considerable extent, and its operation is well illustrated in *Straits Steamship Co. Ltd.* v. *Owen*[30] where a statutory duty was imposed on the Harbour Master to give or refuse his sanction, a condition precedent to a prosecution under the particular Ordinance. He was in duty bound to exercise the discretion vested in him. He did exercise his discretion in refusing sanction, but it was held that upon the evidence of the trial judge he had acted upon the instruction of some other officers, i.e. he had taken into account extraneous matters and this amounted to failure to exercise his discretion and hence mandamus issued against him.[31] Sometimes mandamus may control a discretion even more closely. The court may exclude so many considerations as wrong ones that the administrative body is left without a choice and must act in a particular way; in such a case the court will order it to act in that manner.[32]

28. Duty to hear and determine an appeal: *R.* v. *Housing Tribunal* [1920] 3 K.B. 334.

29. Where the discretion is absolute its exercise cannot be impeached by the courts, with one exception, *viz.* the discretion must not be used for unauthorised purposes.

30. (1932) 1 M.L.J. 167.

31. *Cf. R.* v. *Boteler* (1864) 4 B. & S. 959, which is often cited to illustrate this point.

32. *R.* v. *Kingston Justices, ex. p. Davey* (1902) 86 L.T. 589.

Thirdly, "... mandamus is neither a writ of course nor a writ of right..."[33] *i.e.* the remedy is discretionary and will not be granted even where all the primary requirements for the award of the remedy have been satisfied. It may be refused because of "some delay, or other matter personal to the party applying for it,"[34] or owing to the existence of effective alternative remedies,[35] (even extra-judicial) or because the award of mandamus would be nugatory or futile in the circumstances. In *Chandrasegaram* v. *Prime Minister of the Federation of Malaya*[36] the applicant, who was desirous of a recomputation of his pension, moved for an order of mandamus. It was refused on the grounds, *inter alia.* that the remedy if granted would not be complete as required by section 44(1)(*e*), Specific Relief Ordinance, 1950,[37] as all that was asked for was computation and that will not give payment; also, because of the delay.[38]

On the whole, it is quite clear that the order of mandamus could operate quite effectively as a check or control over executive action within its own sphere. However its main drawback is its discretionary nature, which, coupled with the several other technicalities with which it is hedged in, renders it unreliable as an effective check on administrative action.

Certiorari and Prohibition

This is a "highly acrobatic part of the law.[39] In contradistinction to mandamus, certiorari and prohibition only apply to judicial or quasi-judicial functions for excesses of administrative jurisdiction — prohibition to restrain further acts in excess of jurisdiction, and certiorari to quash any order so made — and not to purely administrative powers. Thus the issue of the orders turns on a mere technicality whether a function is characterized as judicial or administrative — a highly artificial dichotomy to which is added the nebulous concept of "quasi-judicial." The distinction between judicial and quasi-judicial on

33. *Per Lord Goddard: R.* v. *Dunsheath*, *ex. p. Meredith* [1951] 1 K.B. at p. 131.
34. *R.* v. *All Saints Wigan Churchwardens* (1876) 1 App. Cas. at p. 620, *per* Lord Chelmsford.
35. S.40(5), Crown Proceedings Act, 1947, provides that the fact that some other remedy has been created by the Act does not limit the discretion of the court to make an order of mandamus where it might have been done so before the Act. S.44(1)(*d*), Specific Relief (Malay States) Ordinance, 1950, provides that the person applying for anything to be done or forborne must have "no other specific and adequate legal remedy."
36. (1957) 24 M.L.J. 278.
37. This section provides that the issue of the order is subject to the condition that the remedy given by the order applied for will be complete.
38. A delay of four years.
39. De Smith, *Judicial Review of Administrative Action,* p. 50.

the one hand and administrative on the other, is extremely vital and yet no consistently applied test for distinguishing between the two categories can be extracted from the English cases or from the multitudinous decisions from the other common law jurisdictions. To prophesy the view that a court will take of the powers or duties of an administrative authority in a particular case must inevitably remain a hazardous undertaking.

The classic definition of the requirements governing the availability of certiorari and prohibition is that "Wherever any body of persons, having legal authority to determine the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs." — *per* Atkin L.J. in *R.* v. *Electricity Commissioners*.[40]

At the first, the term "judicial" was given a wide and liberal interpretation by the courts. This was the tenor of the law until about a decade ago. The first sign of the change took the shape of *Franklin* v. *Minister of Town and Country Planning*,[41] more popularly known as the *Stevenage Case*, where the House of Lords held that the duty of selecting sites for new towns which is placed upon the Minister of Town and Country Planning by the New Towns Act, 1946, was purely executive despite the Act prescribing certain methods for the discharge of that duty. This included the obligation to consider the report of a public inquiry which the Minister was bound to convene if objections were made and not withdrawn . The case is a departure from a number of Housing Act Cases[42] which decided to the effect that a minister in confirming any order made by a local authority is acting in a purely administrative capacity, but once objections are lodged, the minister assumes a quasi-judicial capacity and must therefore observe the rules of natural justice. In the *Stevenage Case* it was held that the object of the inquiry was to further inform the minister's mind and not to consider any issue between the minister and the objectors. Attempts have been made to distinguish the *Stevenage Case* from the Housing Act cases which reveal glaringly the difficulty of drawing a line between a ministerial and a judicial or a quasi-judicial function. One view forwarded[43] is that the distinction between these two functions is of significance only in the context of the application of the rules of natural justice; these rules have to be observed in the exercise of a judicial or

40. [1924] 1 K.B. 171, 205.

41. [1948] A.C. 87.

42. The most often quoted being *Errington* v. *Minister of Health* [1935] 1 K.B. 249. Quaere: Does *Alkaff & Co.* v. *Governor-in-Council* (1937) 6 M.L.J. 211 still stand after the decision in the Stevenage case?

43. Holland, "High Court Control of Inferior Tribunals" (1952) 5 *Current Legal Problems* 105.

quasi-judicial function, *i.e.* when there is a lis or something analogous to a lis, or where although the "triangular situation" (the judge and the two parties) is absent, the function of the administrator is analogous to a judicial function. The *Stevenage Case* is thus distinguished from the Housing Act cases on the ground of the absence of a lis in the former case, where the minister himself was the initiating party and not a local authority as in the previous cases. However, the decision is not in accordance with cases like *Cooper* v. *Wandsworth Board of Works*[44] where, despite the absence of the lis, the audi alteram partem rule still applied. It was sought to distinguish the *Stevenage Case* from *Cooper's* case on the basis that the function of the demolition board in the latter case was analogous to a judicial function, while that of the minister in the former case was not so. It is submitted that such a distinction is untenable. Prior to the making of an order, the minister had (a) to invite objections to the proposed scheme (b) hold a local inquiry (c) consider the report of the inquiry. In contrast, it is only by a conscious effort that one recognises the making of the demolition order in *Cooper's* case as even quasi-judicial. It is submitted that this divergence is due to the fact that the judges who decided the earlier case were not greatly concerned with the question whether the local board was exercising a judicial or administrative function; the *laissez-faire* economics which governed the day required the maxim audi alteram partem to come into play whenever private rights or interests were directly affected. However, when the *Stevenage Case* was decided, *laissez-faire* was no longer in vogue and in its place was the demand for greater socialization. The courts, responding to the prevailing climate, became diffident and reluctant to interfere overmuch with the implementation of socialization schemes. The cases serve to expose the artificiality of the dichotomy and one could justifiably suspect that the courts classify a particular function according to their inclinations. In deciding whether a function should be treated as "judicial," they have plainly been influenced by the practical consequences of calling it "judicial." Thus the classification of a function as "judicial"[45] or "administrative" is nothing more than a rationalization of a decision prompted by considerations of public policy. This conceptualistic approach is an unsound basis for the issue of either an order of prohibition or certiorari, and the present trend of judicial attitude towards the executive does not seem to augur well for these orders as is seen in the more recent cases. The first speck to darken the horizon was the *Stevenage Case*. Then came *Nakkuda Ali* v. *Jayaratne*[46] which revealed how formal the distinction between judicial and executive functions may become. Here, the Privy Council

44. (1863) 14 C.B. (N.S.) 180.

45. Even the word "judicial" alone is of "engaging versatility" and this is displayed in *Alliance des Professeurs Catholiques de Montreal* v. *Labour Relations Board of Quebec* [1953] 2 S.C.R. 140.

46. [1951] A.C. 66.

declined to accept that a government controller in revoking a textiles licence — in effect a punishment for misconduct — was acting judicially. This was based on two grounds : (a) the controller was not required to follow a procedure analogous to the judicial in arriving at his decision; (b) the controller was not determining a question affecting the rights of subjects but was merely "taking executive action to withdraw a privilege."[47] A distinction is therefore drawn between the deprivation of a right and the deprivation of a privilege, the latter function importing no judicial duty. However it is submitted that it is doubtful whether Atkin L.J. in *R.* v. *Electricity Commissioners*[48] had used the word "rights" in the Hohfeldian sense, *i.e.* rights *stricto sensu;* more likely than not he had used the word loosely, thus including privilege or liberty as well. At any rate, the right-privilege dichotomy is not a very apposite criterion as a guide and should be discarded.[49] Similarly in *R.* v. *Metropolitan Police Commissioner, ex. p. Parker*[50] the revocation of a cab-driver's licence by a Police Commissioner was held to be an executive action and hence certiorari was not available. These two cases illustrate the inadequacy of certiorari as a means of redressing disputes between private citizens and government departments which may arise out of state regulated activities. They give one the impression that the courts have been anxious to avoid the accusation of interfering with the conduct of the administrator. However these cases are anomalous and against older authorities. Mr. H. W. R. Wade[51] has suggested that *Vine* v. *National Dock Labour Board,*[52] where the House of Lords held that the power to deprive a docker of his employment is a judicial function, and completely in line older authorities, may have deprived *Parker's* case of its authority; on the footing that, as the dismissal of Mr. Vine by the disciplinary committee could not have been more disciplinary,[53] yet the proceeding was held to be judicial, then the power to deprive a taxi-driver of his licence is judicial also. He also expresses the hope that *Nakkuda All's* case will meet its Waterloo as the *Strathcona* case met its Trafalgar (both being Privy

47. [1951] A.C. 66, 78.

48. [1924] 1 K.B. at p. 205 *(supra).*

49. This proposition is fortified by *New Zealand United Licensed Victuallers Association of Employers* v. *Price Tribunal* [1957] N.Z.L.R. 165.

50. [1953] 2 All E.R. 717.

51. "Future of Certiorari" (1958) *Cambridge L.J.* 218.

52. [1957] A.C. 488.

53. In *Parker's* case and *Ex p. Fry* [1954] 1 W.L.R. 730, the latter concerning discipline of members of the National Fire Service, the view was forwarded that the courts should not interfere with a disciplinary action by characterising it judicial. Also in *Nakkuda Ali* v. *Jayaratne (supra)* the finding that the controller's functions were not judicial but administrative was fortified by the fact that it was disciplinary in nature.

Council cases). [54] It has also being suggested[55] that *R. v. Manchester Legal Aid Committee*, *ex p. Brand & Co.*,[56] where it was held that a local legal aid committee in issuing a certificate was under a duty to act judically although there was no dispute before them to settle, may prove to be the turn of the tide. Whether this optimism is justified or not, does not detract from the thesis that the foundation on which the orders of certiorari and prohibition rest is wholly unsatisfactory. It makes their issue too dependant on a technicality. The courts have failed to evolve a workable and reliable test; so did the Committee on Ministers' Powers (1932), which made a painstaking attempt to distinguish between an administrative action on one hand and a judicial and quasi-judicial function on the other. Unfortunately, the distinctions drawn were too obscure to offer reliable guidance, and their validity is doubtful anyway. This state of affairs clearly exposes the weakness of judicial review by the prerogative orders, the efficacy of which is rendered indeterminate.

Notwithstanding the difficulty of drawing a line between a judicial or quasi-judicial function and a ministerial one, should the court decide that a particular body is acting judicially, what then is the scope of operation of prohibition and certiorari?

The order of prohibition will lie whenever there is an excess or want of jurisdiction and a breach of rules of natural justice. *In the matter of the Rent Control Ordinance*[57] is an example of the operation of prohibition on the first ground. A Rent Assessment Board made an order granting a landlord permission to eject a tenant. It was induced to rehear the case which it had no jurisdiction to do. Thereupon, the landlord successfully applied for a writ of prohibition to restrain the board from rehearing the case on the ground of excess of jurisdiction.

Thus if a judicial or quasi-judicial body makes an ultra vires order, prohibition will issue to restrain the former from proceeding further in excess of jurisdiction, subject to the limitation that there must be something left for it to operate on. Hence in *Estates and Trust Agencies* v. *S.I.T.*[58] the Privy Council dealt with the propriety of issuing prohibition in a case where the steps that exhibited the quasi-judicial character of the proceedings had been gone through. The demolition order had been made, but it was held that after the order had been approved by the Governor-in-Council the respondent had still to require the appellants to demolish the building and hence there was something

54. The *Strathcona* case [1926] A.C. 108 met its watery grave in *Port Line Ltd.* v. *Ben Line Steamers Ltd.* [1958] 2 Q.B. 146.
55. Keir and Lawson, *Cases on Constitutional Law,* p. 353.
56. [1952] 2 Q.B. 413.
57. (1932) 1 M.L.J. 180.
58. [1937] A.C. 895,

upon which prohibition could still operate and the order was granted. Thus prohibition does play within its own sphere a decisive role in the control of executive action. It is appropriate at this juncture to look at another more recent local case on prohibition relating to rules of natural justice. In *Re Ong Eng Guan's Application*[59] an application for an order of prohibition was made to restrain the commissioner appointed under the Singapore Inquiries Commissions Ordinance from conducting an inquiry to investigate the working of the City Council, on the ground of bias. Rose C.J. held that the Commissioner was not so biased as to disqualify him; furthermore, even if he had been so biased, prohibition would not lie against him as he was appointed not to determine the rights of subjects but merely to make a report, including recommendations. The decision has been criticised[60] as placing undue emphasis on the connection between the two orders of prohibition and certiorari, and that the mere fact that the proceedings were not amenable to certiorari (here because the commissioner makes no order and hence there was nothing to review or quash) does not preclude prohibition from operating. The writer is in full agreement with this criticism; however, it must be recognised that the criticism goes against authorities in so far as it denies that prohibition will not lie where there is no order affecting the rights of subjects. Two of the prerequisites which must be satisfied for the issue of prohibition or certiorari are namely (a) a judicial function and (b) an order embodying the determination of the rights of subjects. In this case, (b) was absent and therefore prohibition could not lie even if the commissioner was proved to be biased. It is submitted that in *R.* v. *Electricity Commissioners*[61] the application was for both the prerogative writs, and hence the *dictum* of Atkin L.J. was a generalization on the scope of both writs and thus the requirement for an order to be made should be taken to relate solely to certiorari and not prohibition. An interpretation otherwise would unnecessarily restrict the scope of prohibition and prevent it from operating where a judicial function is exercised without observance of the rules of natural justice. The ruling that no amount of bias would lead to an order of prohibition cannot but be startling for it appears to deny the doctrine that justice must not only be done but must manifestly and undoubtedly be seen to be done. It is suggested that as long as there has been a breach of the rules of natural justice in the exercise of a judicial function, and so long as there remains something on which prohibition could operate, there is no justification to refuse its grant thereby, because the act impeached is not amenable to certiorari. The decision is important as it serves to demonstrate the limitations (unnecessary ones too) of the order of prohibition stemming from historical reasons.

59. (1959) 25 M.L.J. 92.
60. L. A. Sheridan, University of Malaya Law Review, vol. 1, p. 160,
61. [1924] 1 K.B. 171 *(supra).*

More severely attacked than prohibition is the order of certiorari. Numerous are the complaints made about the pitfalls of certiorari as a remedy in administrative law. The writ is hedged in by technicalities. Defects are of two types (a) procedural and (b) substantive.

Procedural defects are evidenced by the need to make an application within the six-months limit; absence of full facilities for proving facts and cross-examining witnesses, and non-availability of discovery of documents. These shortcomings were brought into prominence in *Barnard* v. *National Dock Labour Board*[62] where a port manager to whom the board had delegated its disciplinary powers without statutory authority, had suspended a certain dock worker. The suspension was unlawful but this was only discovered two and a half years after the suspension, when the plaintiffs brought an action for a declaration. By then the time limit for applying for certiorari had expired, but we know that in certiorari proceedings there is no discovery and without discovery, the illegality of the suspension could not have been known; it was a vicious *cul-de-sac*. In *Barnard's* case the court granted a declaration and it appears that the courts encourage a boycott of certiorari in favour of the declaration, which is also a discretionary remedy and subject to the disadvantages of discretionary remedies. More recently another of the vagaries of certiorari was brought home in *Baldwin and Francis Ltd.* v. *Patents Appeal Tribunal*[63] where an appellant company sought an order of certiorari to quash the decision of the Patents Appeal Tribunal for an error of law on the face of the record, *viz.* a misconstruction of rival specifications. The Court of Appeal held that in order to determine whether the specifications had been misconstrued, the court had to be informed by evidence so as to understand the language used therein. But on certiorari application, evidence in lower proceedings or new affidavit evidence was not available and therefore the application failed. This would be so whenever the issue is too technical. However the House of Lords saved the order from being clogged by yet another anomaly. Lord Denning said at p. 843, "The one thing that the court ought not to do is to refuse jurisdiction in a case because it does not understand the technical terms employed in it. Scientists and engineers are entitled to have their wrongs redressed as well as anyone else" and the courts may determine the meaning of such terms by consulting dictionaries or by the appointment of assessors under section 98 of the Supreme Court of Judicature (Consolidation) Act, 1925. The court ought "…to take judicial notice of all such things as it ought to know in order to do its work properly." At any rate, as far as these defects of procedure go, they can be remedied by assimilating the procedure for certiorari

62. [1953] 2 Q.B. 18.

63. [1959] A.C. 663.

with procedure in ordinary actions. Until this reform takes place,[64] the sphere of operation of certiorari is unnecessarily limited, and rendered less effective.

The substantive defects have been considered earlier while considering the exact limits of the judicial function and the futile search for a working test of the distinction between judicial and administrative functions. Certiorari will be granted to quash an order made in excess[65] or want of jurisdiction, in breach of the rules of natural justice and also for an error of law on the face of the record. Interference on the ground of excess of jurisdiction is illustrated in *Heap Tong Hoe* v. *Yew Siew Tuan*[66] where a Rent Assessment Board issued a certificate for the demolition of buildings to the owner of the land on which the buildings stood. Thereupon, the owner of the buildings successfully obtained an order of certiorari to quash the certificate on the ground that the board could only issue a demolition certificate to the person who is the owner within the meaning of sections 8(1)(*d*) and 13(1)(*m*) of the Control of Rent Ordinances, 1948, *viz.* the owner of the buildings and not the owner of the land. The board had obviously exceeded its jurisdiction, and the certificate was quashed.[67]

The last head of interference has been subjected to a considerable amount of attention ever since it was held that certiorari would lie to quash a decision of a statutory tribunal for an error of law on the face of the record even if the error did not go to the jurisdiction of the tribunal — *R.* v. *Northumberland Compensation Appeal Tribunal*, *ex p. Shaw*.[68] The only reported Malayan case on this point is *Re*

64. By s.99, Supreme Court of Judicature (Consolidation) Act, 1925, the Rule Committee has the remedy in its own hands. However it may be diffident to exercise its powers with respect to radical reform. If so an Act of Parliament is necessary.

65. Excess of jurisdiction is not necessarily coincident with ultra vires. Also, the condition precedent to the exercise by an inferior tribunal of its powers is a collateral question and therefore reviewable by the superior courts in its supervisory as opposed to its appellate jurisdiction. A collateral question is said to be "extrinsic to the adjudication impeached" — *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417. But a question into which a tribunal has to inquire prior to arriving at its decision can hardly be extrinsic to its jurisdiction. It would not be surprising if the court declared a fact "collateral" after deciding to interfere with the administrative tribunal. This has the effect of widening this ground of interference considerably.

66. (1954) 20 M.L.J. 64.

67. See also *Ex p. Yeoh Poh Neo* (1947) 13 M.L.J. 59 where a Rent Assessment Board acted in excess of jurisdiction in fixing a new rental for certain premises because its powers were, in a case where the statutory rental had already been fixed, to authorise or refuse an increase of the latter rent and not to fix a new rental at its discretion.

68. [1951] 1 K.B. 711.

Sithambaram Chettiar [69] where the applicant for certiorari was the owner of land which became submerged by the advance of the sea which later receded. The Collector of Land Revenue under section 9(1) of the Crown Lands Encroachments Ordinance after an enquiry, held the appellant's claim to the land invalid upon which the applicant sought to impeach the order by certiorari. The court held that the collector in considering and rejecting the applicant's claim to the land was exercising a judicial function; that the owner of the land was entitled to regain possession after it became high and dry by the gradual recession of the water. Therefore there was a clear error of law on the face of the written decision given by the collector and the order for certiorari was granted to quash it. It is clear from the case that had the decision been unwritten, the applicant would have failed in his application. Thus the effectiveness of review depends on the readiness of tribunals to volunteer written reasons for their decisions, for few tribunals are compelled to make a comprehensive record. However, this defect has been remedied by section 12 of the Tribunals and Inquiries Act, 1958, which requires reasons to be given for decisions both by tribunals and by ministers after statutory inquiries.[70] Section 12(3) provides that reasons when given shall form part of the decision and be incorporated in the decision. This will produce "speaking orders" and will meet the complaint often voiced since 1951 that certiorari will lie to review errors of law on the face of the record, but that the record may have "the inscrutable face of a sphinx" or may "speak with the ambiguous voice of an oracle." Section 12 therefore is the death warrant of sphinxes and oracles. Furthermore, a series of recent cases have widened the scope of certiorari on this ground by letting in as part of the "speaking order" documents referred to in the tribunal's award provided they are relevant and could be identified with sufficient particularity. In *R.* v. *Medical Appeal Tribunal, ex. p. Gilmore* [71] extracts from a specialist's report were incorporated and this made the whole report available. This is more clearly illustrated in *Baldwin and Francis Ltd.* v. *Patents Appeal Tribunal* [72] where both specifications were held to form part of the record of the tribunal, the one because it was the document initiating the proceedings and the other because extracts from it were set out in the tribunal's decision.[73] Besides the

69. (1955) 21 M.L.J. 213.

70. This section is subject to limitations; statements may be refused or specification of reasons restricted, on grounds of national security.

71. [1957] 1 Q.B. 574.

72. [1959] A.C. 663.

73. *Cf. Davis* v. *Price Tribunal* [1958] 1 W.L.R. 434 where the statement of a case by an agricultural executive committee was held to be not part of the record of an agricultural land tribunal. It is significant that Lord Denning, an enthusiastic advocate of the extension of the doctrine for error of law on the face of the record, was not a member of the court. Perhaps he may yet have his say should the case ever proceed to the House of Lords.

inclusion of documents into the "speaking order," the courts have also widened the scope of certiorari by treating as errors of law, findings and inferences which they might otherwise have treated as errors of fact as in the "paired organ" cases; here, decisions by medical appeal tribunals that fingers[74] and legs[75] were not complementary organs of the body within the meaning of the relevant regulations were held to be erroneous in point of law. However, it is submitted that despite the extension of the scope of impeaching a decision for error of law on the face of the record, this ground of interference will cease to be so widely applied in certiorari cases because the Tribunals and Inquiries Act, 1958, has provided for direct appeals on law to the High Court.

Finally, overtopping the technicalities which bog down the sphere of operation of the prerogative orders is their susceptibility to be excluded by statutory formulae. It is proposed at this juncture to look briefly at the legislative technique employed to restrict or exclude judicial review, and the attitude adopted by the courts in so far as they may augur fair or ill to the prerogative orders.

Statutory exclusion or restriction may be direct or indirect. Direct exclusion may assume the following form. Section 9 of the Rubber Supervision Enactment, 1937, provides that, "No suit or proceeding shall be maintainable in any court of justice in respect of any refusal, suspension or cancellation referred to in sections 7 and 8." A layman may well think that this section would deprive the courts of any jurisdiction, but in *Tan Eng Seong* v. *Rubber Supervision Licensing Board*[76] where an order of mandamus was sought to direct the board to state their reasons for cancelling a licence, Taylor J. said at p. 226 : "The true effect of section 9 is to preclude the courts from reviewing the decisions of administrative tribunals on their merits. They are final and not appealable. This does not wholly exclude the remedies of certiorari and mandamus..."

Statutory exclusion may also take the form of the "finality clause" as in *Ex. p. Gilmore*[77] where the relevant Act provides that "any decision or a claim or question shall be final". Despite this clause, the Court of Appeal held that certiorari was available to quash the decision of the Medical Appeal Tribunal for an error of law on the face of the record.[78] Another practice is to specifically exclude certiorari

74. *R.* v. *Medical Appeal Tribunal*, *ex p. Burpitt* [1957] 2 Q.B. 584.

75. *R.* v. *Medical Appeal Tribunal*, *ex p. Griffiths* [1958] 1 W.L.R. 5.

76. (1950) 16 M.L.J. 226; (1951) 17 M.L.J. 134, the Court of Appeal decision.

77. [1959] 1 Q.B. 574.

78. In *Pyx Granite Co. Ltd.* v. *Ministry of Housing and Local Government* [1958] 1 Q.B. 554, a finality clause was held not to affect the power of the court to award a declaration that a decision made by a statutory body is invalid. For Commonwealth decisions on privative clauses see *Ladamuttu Pillai* v. *A.-G.*

and other judicial remedies by name, *e.g.* the Labour Relations Act of Ontario (1948) provides that "...the orders, decisions...of the Board shall be final...nor shall the Board be restrained by injunction, prohibition, mandamus, quo warranto, certiorari..." Despite such clear wording, the Canadian courts have held that certiorari would lie, on the basis that where the Board acts in such a manner that the court is able to say it is acting without jurisdiction, and hence outside the statute, by necessary implication, it is not entitled to the protection afforded by statute.[79] Yet one might gather it is precisely for such contingencies that the clause was originally inserted. It is interesting to note a similar clause in section 44 of the widely publicised Industrial Relations Ordinance, 1960 (Singapore), with respect to which a future occasion may arise to demonstrate local jugglery of the canons of construction. The position in the United Kingdom is now covered by legislation. Section 11 of the Tribunals and Inquiries Act, 1958, prevents "judge proof" clauses in existing statutes from impeding the jurisdiction of the High Court by way of certiorari and mandamus. However, "the sting of the section" is in its tail — cases where a time limit is imposed for application to the High Court are excepted.[80] These decisions as well as the Tribunals and Inquiries Act have nipped in the bud the pronounced tendency towards statutory curtailment of judicial review and have enlarged the efficacy of the prerogative orders to some extent.[81]

The executive, however, is more resourceful and has induced the legislature to confer powers on them in terms so wide that it is well nigh impossible for a court ever to hold that they have been exceeded. It is a very popular practice to confer upon public authorities powers which are exercisable when they are "satisfied" or when "it appears to them" or where "in their opinion" a certain state of affairs exists. Thus in *Robinson* v. *Minister of Town and Country Planning*,[82] where the relevant statute empowers the minister to make a compulsory purchase order if "...the Minister...is satisfied..."[83] of the existence of

(1958) 59 N.L.R. 313, where a statute providing that a decision made by a statutory functionary should be final was held not to oust the jurisdiction of the courts; *Colonial Bank of Australasia* v. *Willan* (1874) L.R. 5 P.C. 417.

79. *Re Ontario Labour Relations Board* [1951] 3 D.L.R. 162.

80. Thus the *Smith v. East Elloe R.D.C.* [1956] A.C. 736 type of case is left unaffected.

81. In the United Kingdom although these decisions have been superseded the section only applies to Acts passed before the commencement of the Tribunals and Inquiries Act, 1958, and therefore the decisions are still of relevance in the interpretation of statutes passed thereafter.

82. [1947] K.B. 702.

83. S.5, Land Acquisition Ordinance, 1920 (Cap. 248), provides that "... *whenever it appears* to the Governor-in-Council that any particular land is needed for a public purpose ... a declaration shall be made to the effect ..." Presumably it will be given a subjective interpretation.

certain facts, it was held that the effect of such formulation is that the minister's satisfaction is a private affair between himself and his Maker, and is not liable to be challenged in the courts.[84] However there have been a number of dicta which may have relaxed the strictures of the rule, by recognising that an administrative act may be invalidated if it were shown that there was no evidential or rational basis upon which it could have been based. Thus in *Re Choo Jee Jeng*,[85] following the dictum of Lord Morton of Henryton in *Ross-Clunies* v. *Papadopoullos* [86] it was held that where a statute requires that a public officer should be satisfied of something before exercising a statutory power if it could be shown that there were no grounds on which he could be so satisfied, the court might infer either that he did not honestly form that view or that in forming it he could not have applied his mind to the relevant facts.

The courts have on the whole as far as statutory curtailment of judicial review is concerned rallied in favour of the interest of the individual as is seen in the slight though significant relaxation in the interpretation of highly subjective terms.[87]

84. In Singapore, the "is satisfied" clause has achieved notoriety through a series of persistent though vain attempts to impeach by h*abeas corpus* proceedings detention orders made under the Preservation of Public Security (Amendment) Ordinance, 1959, and the Criminal Law (Temporary Provisions (Amendment No. 2) Ordinance, 1959, the relevant sections being s.(3)(*a*)(l) and s.4 respectively. Under s.3(*a*)(l), "If the Yang di-Pertuan Negara *is satisfied* with respect to any person that with a view to prevent that person from acting in any manner prejudicial to the security of Malaya . . . . " the minister shall make a detention order or other restrictions as may be required. S.4 provides that "Whenever the Minister *is satisfied* with respect to any person that such person has been associated with activities of a criminal nature . . . " he could make detention orders or impose such restrictions on that person's activities as are necessary. The results of such applications were foregone conclusions as the expression "is satisfied" could hardly be treated as establishing anything but a subjective test and accordingly an affidavit stating the bare fact that the Yang di-Pertuan Negara or the minister was satisfied that the detention was necessary, is conclusive and cannot be rebutted.

85. (1959) 25 M.L.J. 217.

86. [1958] 2 All. E.R. at p. 33; the case concerned the imposition of a collective fine on a Greek-Cypriot community and one of the issues was whether the commissioner in holding the prescribed inquiry had fulfilled the requirement "to satisfy" himself that the inhabitants were given "adequate opportunity of understanding the subject matter of the inquiry and making representation thereon." It was held that whether he had discharged this duty is a subjective test; however, it was recognised that some qualification may be placed on a subjective test imposed by a requirement that a public officer should be satisfied of something before exercising a statutory power. *Cf. Goddard* v. *Minister of Housing and Local Government* [1958] 1 W.L.R. at pp. 1153 -1154.

87. *Cf.* the attitude of the court in *In the Matter of Ong Yew Teck* (1960) *26* M.L.J. 67, where it was held that "has reason to believe" imposes a subjective test after due consideration of both *Liversidge* v. *Anderson* [1942] A.C. 206; and *Nakkuda AH* v. *Jayaratne* [1951] A.C. 66.

Finally, the overall impression drawn from this brief survey of the scope of the prerogative orders is that they present an immensely complicated and confusing method of judicial review of administrative action, falling far short of a simple general remedy against administrative decisions. Besides their procedural complexity — a wrong choice of an order being fatal to the action — the prerogative orders when in operation, touch more on the form than the substance of the proceedings. There is no appeal on the merits of a decision[88] and where administrative action is concerned, the courts are impotent unless breach of contract or tort is involved. On the other hand it should be recognised that hedged in as the prerogative orders are by cumbersome technicalities, they are not entirely without effect within a limited sphere. Besides, use could be made of the declaration and injunction, which probably fill the gaps left by the prerogative orders in the individual's protective armour. Moreover, one must not lose sight of the fact that judicial review is only one of several checks on the executive. The administrator may have to answer politically for his acts. However, on the last score, it is submitted that in modern political conditions it is exceptional for individual cases of injustice to receive adequate attention and also the cost of litigation is prohibitive [89] — which is enhanced by unnecessary technicalities surrounding the prerogative orders. Reform is required and the writer favours the abolition of the traditional forms and the substitution of a simplified petition procedure after the continental pattern, though care must be taken not to emulate the American experience.[90] But for the present, as the law now stands, the remedy lies in the courts adopting a liberal (not necessarily obstructive) judicial attitude in the application of mandamus, prohibition and certiorari.

HUANG SU MIEN. *

88. The Franks Committee recommended appeal "on fact, law and merits" from a tribunal of first instance to an appellate tribunal. This was not implemented by the Tribunals and Inquiries Act, 1958.

89. The Franks Committee recommended the extension of the legal aid scheme to formal and expensive tribunals and final appellate tribunals. Regrettably, it was rejected by the government, despite the recognition in principle that the right of legal representation should be curtailed only in the most exceptional circumstances. In Singapore, that part of the Legal Aid and Advice Ordinance, 1956, in force (s.8 (1)) applies only to civil proceedings in the High Court and the District Courts and, presumably, proceedings before administrative tribunals are excluded.

90. Certain states in the U.S.A. abolished the prerogative orders but the courts in determining whether relief should be granted often found it necessary to fall back on the traditional remedies, thus becoming entangled in their intricate network of concepts and defeating the purpose of reform. It became the practice to describe proceedings as "actions in the nature of mandamus."

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